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Thursday, March 09, 2006

The Magna Carta, Pt. I

> JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.
>
> KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of [list of various bishops, earls, etc. many of them in rebellion at the time]:
>
> (1) FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

So seriously did the Norman kings take the theory that they originally owned all rights in all things corporeal and incorporeal that were appurtenant to their kingdom, that they "granted" subsets of these rights to God Himself. Similarly, English kings would in this and future charters "grant" what were really recognitions of existing rights. In the case of electing bishops, however, this was a right that had recently been one during the Papal Revolution wherein the pope across Europe successfully asserted the right, previously usually practiced by kings and the more powerful feudal lords, to appoint bishops. This was the beginning of the idea of the separation of church and state. This separation however never fully took hold in England, as this part of the Magna Carta was abrogated when the English Church split from the Catholic Church during the reign of Henry VIII, and even before this time secular authorities assisted the "English Church" in punishing heresy.

Compare the above clause to clause 13 (this is out of order for the purposes of comparison):

> (13) The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

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This similar sweeping language recognizing the enjoyment of ancient liberties and customs (but as individual rights of residents rather than as the corporate rights of cities) would later occur in many later North American colonial charters. In that context they were easements in favor or third-party beneficiaries rather than grants to the parties to the charter as here.

And now to the main clause of the Great Charter:

> TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

This is the main clause of the first Great Charter of liberties under the English legal tradition. Unless otherwise specified, every liberty granted by the Great Charter is granted to all free men in perpetuity. "Free men" roughly meant all who were tenants rather than villeins (serfs). With the ends of serfdom and slavery it came to mean all residents, although it was sometimes construed just to mean all property owners or all citizens. Many modern property deeds use this same kind of language, albeit the rights they grant are usually far less valuable.

> (2) If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a 'relief', the heir shall have his inheritance on payment of the ancient scale of 'relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight l00s. at most for the entire knight's 'fee', and any man that owes less shall pay less, in accordance with the ancient usage of 'fees'

The basic idea here is that, in exchange for being subject to military service, inheritance taxes are reduced to a small fee. Having a tenure such as fee simple held "directly of the Crown" was as close as you came to outright ownership under King John. Compared to modern zoning, except for restrictions on buying and selling you actually had far better property rights under King John with these "tenures" then we do under modern zoned "ownership." Indeed, our modern forms of land ownership are just these tenures, under the same names, e.g. fee simple, with taxes of various kinds instead of "aids" and "scotage." Arguably modern forms of ownership such as fee simple are held "directly of" our government instead of the king himself. If the Magna Carta still applies to those of us living under the English legal tradition, then arguably under this clause any of us who have ever been registered for the draft is immune to all but these minimal inheritance taxes. This might encourage the wealthy to stop bribing their way out of drafts the rest of us are subject to.

> (4) The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property...

This clause could come straight out of a modern law and economics textbook. The problem of "waste," wherein a temporary possessor of property loots it, is still a big problem in modern property law. It's also a big problem for the whole country when you have a temporary dictator rather than a king who expects his heir(s) to take the throne. By the way, the guardianship was actual alienable property -- once the king or lord granted guardianship of one of their underage tenants to somebody, that office could be bought or sold as well as devised or transferred via marriage.

> (12) No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly.

For political scientists interested in the origins of democracy is the most famous clause of the Magna Carta, along with

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> (14) To obtain the general consent of the realm for the assessment of an 'aid' - except in the three cases specified above - or a 'scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

In other words, for the king to collect his rents, i.e. "aid" and "scutage," he needed the consent of an assembly of his nobles (which became the House of Lords) and his other immediate tenants ("those who hold lands directly of us," which became the House of Commons). There is no representation at this point -- all the king's tenants who can take time off to come to give their "general consent" may do so (presumably by a vote, although whether majority, super-majority, or full consensus are required to obtain "general consent" is not specified). From this tradition came the American slogan, "no taxation without representation." Until recently there was a now neglected symmetry -- no representation without taxation. Our legislatures originated in both principles -- that tenants of the realm had the right to collectively negotiate their rent, and that only tenants who paid rent were entitled to so negotiate.

To be continued...

Posted by Nick Szabo at 9:56 PM

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